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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 LEONID KUCHEROV,

8 Plaintiff,

9 v.

10 MTC FINANCIAL, INC. and CIT BANK,

11 Defendants.

CASE NO. C16-5276 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS AND DENYING
DEFENDANT'S MOTION TO
STRIKE

12
13 This matter comes before the Court on Defendant CIT Bank, N.A.'s ("CIT")
14 motion to dismiss (Dkt. 8) and motion to strike response (Dkt. 22). The Court has
15 considered the pleadings filed in support of and in opposition to the motions and the
16 remainder of the file and hereby rules as follows:

17 **I. PROCEDURAL HISTORY**

18 On March 17, 2016, Leonid Kucherov ("Kucherov") filed a complaint against
19 Defendants CIT and MTC Financial, Inc. in Clark County Superior Court for the State of
20 Washington. Dkt. 2, Exh. A ("Comp"). Kucherov alleges causes of action for breach of
21 contract, wrongful foreclosure, slander of title, violations of the Washington Consumer
22 Protection Act ("CPA"), slander of credit status, intentional infliction of emotional

1 distress, fraud, misrepresentation, civil conspiracy, quiet title, and violations of the Fair
2 Debt Collections Practices Act (“FDCPA”). *Id.*

3 On April 11, 2016, CIT removed the matter to this Court. Dkt. 1.

4 On April 18, 2016, CIT filed a motion to dismiss. Dkt. 8. On June 2, 2016,
5 Kucherov responded. Dkt. 21. CIT did not reply. However, on June 3, 2016, CIT filed a
6 motion to strike Kucherov’s response. Dkt. 22. Kucherov did not respond.

7 **II. FACTUAL BACKGROUND**

8 In March of 2006, Kucherov obtained a construction loan from IndyMac Bank in
9 the amount of \$648,000. Comp., ¶ 8. After construction of the residence was completed
10 in 2008, Kucherov alleges that he obtained a new loan that superseded the original loan
11 and contained terms more favorable to Kucherov. *Id.*, ¶ 10. Kucherov alleges that CIT
12 accepted payments on the loan under terms of the construction loan instead of the terms
13 of the new loan. *Id.*, ¶ 11. Kucherov attempted to reconcile the dispute via a loan
14 modification, but was ultimately denied a modified loan. *Id.*, ¶¶ 12–16. The failure to
15 accept Kucherov’s payments or grant a loan modification has led to a pending foreclosure
16 action. *Id.*, ¶ 22. Based on filings in a related suit in this district, CIT’s attorney
17 represented that the property was foreclosed on May 20, 2016. *See OWB REO, LLC v.*
18 *Kucherov*, C16–5565RBL (W.D. Wash. 2016), Dkt. 3.

19 **III. DISCUSSION**

20 **A. Motion to Strike**

21 CIT moves to strike Kucherov’s response because it is untimely. While CIT may
22 be prejudiced by prolonging this litigation, the Court prefers resolving disputes on the

1 merits instead of technical procedural errors. Moreover, Kuchеров alleges that CIT
2 foreclosed a property that carries a market value in excess of one million dollars for
3 failure to repay a \$648,000 loan. CIT does not contest these allegations. Therefore,
4 based on the current record, CIT has excess collateral to cover any additional expenses in
5 defending itself in this matter. The Court denies CIT's motion to strike.

6 **B. Motion to Dismiss**

7 CIT moves to dismiss Kuchеров's complaint in its entirety. The Court will
8 address each of Kuchеров's claims.

9 **1. Standard**

10 Motions to dismiss brought under Rule 12(b)(6) may be based on either the lack of
11 a cognizable legal theory or the absence of sufficient facts alleged under such a theory.
12 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material
13 allegations are taken as admitted and the complaint is construed in the plaintiff's favor.
14 *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to
15 dismiss, the complaint does not require detailed factual allegations but must provide the
16 grounds for entitlement to relief and not merely a "formulaic recitation" of the elements
17 of a cause of action. *Twombly*, 127 S. Ct. at 1965. A plaintiff must allege "enough facts
18 to state a claim to relief that is plausible on its face." *Id.* at 1974.

19 In the event the court finds that dismissal is warranted, the court should grant the
20 plaintiff leave to amend unless amendment would be futile. *Eminence Capital, LLC v.*
21 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). "[D]ismissal is proper only if it is
22

1 absolutely clear that the deficiencies of the complaint could not be cured by amendment.”
2 *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980).

3 **2. Breach of Contract**

4 “A breach of contract is actionable only if the contract imposes a duty, the duty is
5 breached, and the breach proximately causes damage to the claimant.” *Nw. Mfrs. v.*
6 *Dep’t of Labor*, 78 Wn. App. 707, 712 (1995).

7 In this case, CIT argues that Kuchеров fails to state a valid breach of contract
8 claim. The Court agrees. Kuchеров alleges that CIT breached the promissory note, but
9 fails to identify whether CIT breached the initial note or the superseding note and what
10 provision of that particular note. Kuchеров also appears to allege that CIT failed to grant
11 a loan modification, but fails to identify any contractual provision that obligates CIT to
12 grant such a modification. Therefore, the Court grants CIT’s motion on Kuchеров’s
13 breach of contract claim.

14 The Court, however, is unable to conclude that it is absolutely clear that the
15 deficiencies in this claim can not be cured by any amendment. Based on the allegations,
16 the parties entered into at least two loan contracts and failure to credit payments under
17 such a contract may state a claim for breach of that contract. Therefore, the Court grants
18 Kuchеров leave to amend his complaint.

19 **3. Wrongful Foreclosure**

20 CIT argues that the Court should dismiss this claim because no foreclosure sale
21 has occurred. Dkt. 8 at 7. However, in an action for unlawful detainer, CIT’s counsel
22 asserted that the subject property was foreclosed on May 20, 2016. *See OWB REO, LLC*

1 *v. Kuchеров*, C16–5565RBL (W.D. Wash. 2016), Dkt. 3. Therefore, the Court denies
2 CIT’s motion on this issue without prejudice.

3 **4. Slander of Title**

4 In Washington, a slander of title claim has five elements: “(1) false words; (2)
5 maliciously published; (3) with reference to some pending sale or purchase of property;
6 (4) which go to defeat plaintiff’s title; and (5) result in plaintiff’s pecuniary loss.” *Rorvig*
7 *v. Douglas*, 123 Wn.2d 854, 859 (1994). “Slander of title is only available where the
8 defendant has interfered with the plaintiff’s sale of the property.” *Lapinski v. Bank of*
9 *Am., N.A.*, C13–00925, 2014 WL 347274, at *5 (W.D.Wash. Jan.30, 2014).

10 In this case, CIT argues that Kuchеров has failed to allege any facts showing that it
11 interfered with Kuchеров’s sale of the property. The Court agrees and grants CIT’s
12 motion to dismiss this claim. However, it is not absolutely clear that the claim could not
13 be saved by amendment. Therefore, the Court will grant Kuchеров leave to amend this
14 claim.

15 **5. CPA**

16 The CPA “prohibits ‘[u]nfair methods of competition and unfair or deceptive acts
17 or practices in the conduct of any trade or commerce.’” *Trujillo v. Nw. Tr. Servs., Inc.*,
18 183 Wn.2d 820, 834–35 (2015) (quoting RCW 19.86.020). “To succeed on a CPA claim,
19 a plaintiff must establish (1) an unfair or deceptive act (2) in trade or commerce (3) that
20 affects the public interest, (4) injury to the plaintiff in his her business or property, and
21 (5) a causal link between the unfair or deceptive act complained of and the injury
22 suffered.” *Id.*

1 In this case, CIT argues that Kuchеров has failed to allege sufficient facts to state a
2 CPA claim. The Court agrees. In his two paragraphs stating this claim, Kuchеров uses
3 only labels and conclusions as to the elements of the claim and fails to allege sufficient
4 facts to state a valid claim. Therefore, the Court grants CIT's motion to dismiss this
5 claim. Although CIT argues that Kuchеров's allegations are too individualized to support
6 a broad consumer protection claim, the Court grants Kuchеров leave to amend because it
7 is not absolutely clear that the claim could not be saved by amendment.

8 **6. Slander of Credit**

9 CIT argues that Washington law does not recognize a "slander of credit" cause of
10 action. The Court agrees. *See Handy v. State*, 85 Wn. App. 1024 (1997). Kuchеров fails
11 to cite any authority to the contrary. Therefore, the Court grants CIT's motion to dismiss
12 this claim with prejudice.

13 **7. Intentional or Negligent Infliction of Emotional Distress**

14 To recover for intentional infliction of emotional distress, a plaintiff must prove
15 the elements of outrage: "(1) extreme and outrageous conduct; (2) intentional or reckless
16 infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional
17 distress." *Dicomes v. State*, 113 Wn.2d 612, 630 (1989). Although these three elements
18 are questions of fact for the jury, the Court must initially "determine if reasonable minds
19 could differ on whether the conduct was sufficiently extreme to result in liability." *Id.*
20 "The conduct in question must be so outrageous in character, and so extreme in degree,
21 as to go beyond all possible bounds of decency, and to be regarded as atrocious, and
22 utterly intolerable in a civilized community." *Id.* (internal quotation marks omitted).

1 In Washington, the elements of a negligent infliction of emotional distress claim
 2 are (1) duty, (2) breach, (3) proximate cause, and (4) damages or injury. *Snyder v.*
 3 *Medical Serv. Corp.*, 145 Wn.2d 233, 243 (2001). The threshold determination in a
 4 negligence action is whether the defendant owes a duty of care to the plaintiff. *Taylor v.*
 5 *Stevens Cnty.*, 111 Wn.2d 159, 163 (1988). The existence of a legal duty is a pure
 6 question of law. *Folsom v. Burger King*, 135 Wn.2d 658, 671 (1998).

7 In this case, CIT argues that Kuchеров fails to state a claim for relief for either
 8 intentional or negligent infliction of emotional distress. The Court agrees because
 9 Kuchеров’s claims are merely labels and conclusions. Therefore, the Court grants CIT’s
 10 motion to dismiss these claims. However, the Court grants Kuchеров leave to amend
 11 these claims because it is not absolutely clear that they could not be saved by any
 12 amendment.

13 **8. Fraud and Misrepresentation**

14 To state a claim for fraud or intentional misrepresentation, Kuchеров must allege
 15 “(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s
 16 knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the
 17 plaintiff; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the
 18 representation; (8) plaintiff’s right to rely upon it; and (9) damages suffered by the
 19 plaintiff.” *Adams v. King Cty.*, 164 Wn.2d 640, 662 (2008) (fraud); *Carlile v. Harbour*
 20 *Homes, Inc.*, 147 Wn. App. 193, 205 (2008) (intentional misrepresentation).
 21 Additionally, a plaintiff alleging fraud “must state with particularity the circumstances
 22 constituting fraud[.]” Fed. R. Civ. P. 9(b). “This has been interpreted to mean the

1 | pleader must state the time, place and specific content of the false representations as well
2 | as the identities of the parties to the misrepresentation.” *Miscellaneous Serv. Workers,*
3 | *etc. v. Philco-Ford Corp., WDL Div.*, 661 F.2d 776, 782 (9th Cir. 1981).

4 | In this case, CIT argues that Kuchеров has failed to state these claims with
5 | particularity. Specifically, CIT asserts that Kuchеров fails to specify the speaker, the
6 | time and place of the statement, the intent of the speaker, ignorance of the falsity of the
7 | statement, and reliance on the statement. The Court agrees. Therefore, the Court grants
8 | CIT’s motion to dismiss this claim. However, the Court grants Kuchеров leave to amend
9 | because it is not absolutely clear that it could not be saved by any amendment.

10 | **9. Civil Conspiracy**

11 | To state a claim for civil conspiracy, a plaintiff must allege that “(1) two or more
12 | people combined to accomplish an unlawful purpose, or combined to accomplish a lawful
13 | purpose by unlawful means; and (2) the conspirators entered into an agreement to
14 | accomplish the conspiracy.” *Alexander v. Sanford*, 181 Wn. App. 135, 180–81 (2014)
15 | (internal quotation and citations omitted).

16 | In this case, CIT argues that Kuchеров fails to state a claim because he, at least,
17 | fails to allege an agreement to conspire between two people. The Court agrees. In fact,
18 | Kuchеров does not specify any particular agreement in his response. Therefore, the
19 | Court grants CIT’s motion to dismiss this claim. However, the Court grants Kuchеров
20 | leave to amend because it is not absolutely clear that it could not be saved by any
21 | amendment.
22 |

1 **10. Quiet Title**

2 “An action to quiet title is an equitable proceeding designed to resolve competing
3 claims of ownership.” *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294,
4 322 (2013) (internal quotation omitted).

5 In this case, CIT argues that Kuchеров’s claim for quiet title fails as a matter of
6 law. The Court agrees because Kuchеров does not have a claim to ownership of the
7 property in question. In fact, Kuchеров admits that he was applying for a loan
8 modification when the foreclosure proceeding began. Therefore, the Court grants CIT’s
9 motion to dismiss this claim with prejudice.

10 **11. Fair Debt Collections**

11 In his Eleventh Claim, Kuchеров alleges violations of “the Federal and State Fair
12 Debt Collection Practices Act.” Comp., ¶ 72. With regard to the state statute, the act
13 regulates collection agencies and expressly excludes mortgage banks and banks. RCW
14 19.16.100(c). There is no dispute that CIT is a bank. Therefore, the Court grants CIT’s
15 motion on this issue and dismisses Kuchеров’s claim with prejudice.

16 With regard to the federal statute, Kuchеров “must allege facts sufficient to show
17 that (1) the defendant was collecting a debt as a debt collector, and (2) its debt collection
18 actions violated a federal statute.” *Greer v. Green Tree Servicing, LLC*, No. 3:14-CV-
19 05594-RJB, 2015 WL 4077432, at *2 (W.D. Wash. July 6, 2015). “However, as this
20 Court and other courts have found, nonjudicial foreclosure actions do not constitute ‘debt
21 collection,’ unless alleged under § 1692f(6).” *Titus v. Wells Fargo Bank, N.A.*, No. 15-
22 05690-RJB, 2015 WL 9308314, at *2 (W.D. Wash. Dec. 22, 2015). Accordingly,

1 Kucherov cannot state a claim for violation of the FDCPA unless he states a claim under
2 15 U.S.C. § 1692f(6). Section 1692f(6) provides that nonjudicial foreclosure activity is
3 unlawful only if one of three statutory conditions exists: “(A) there is no present right to
4 possession of the property claimed as collateral through an enforceable security interest;
5 (B) there is no present intention to take possession of the property; or (C) the property is
6 exempt by law from such dispossession or disablement.” 15 U.S.C. § 1692f(6).

7 In this case, CIT argues that Kucherov has failed to allege sufficient facts to state a
8 claim for relief under the FDCPA. The Court agrees. Kucherov fails to allege any facts
9 to support one of the statutory conditions for an unlawful foreclosure. More importantly,
10 Kucherov fails to allege any act within the one-year statute of limitations. 15 U.C.C. §
11 1692k(d). Therefore, the Court grants CIT’s motion to dismiss this claim. However, the
12 Court grants Kucherov leave to amend because it is not absolutely clear that it could not
13 be saved by any amendment.

14 IV. ORDER

15 Therefore, it is hereby **ORDERED** that

- 16 1. CIT’s motion is **GRANTED in part** and **DENIED in part** as stated herein;
- 17 2. Kucherov’s claims for slander of credit, quiet title, and violation of the state
18 law collection act are **DISMISSED with prejudice**;
- 19 3. Kucherov’s claims for breach of contract, slander of title, CPA, intentional
20 and negligent infliction of emotional distress, fraud and misrepresentation, civil
21 conspiracy, and violations of the FDCPA are **DISMISSED without prejudice** and
22 Kucherov is **GRANTED** leave to amend these claims; and

1 4. Kucherov may file an amended complaint no later than August 5, 2016.
2 Kucherov may only amend the claims dismissed without prejudice and any other
3 amended claims will be subject to dismissal for failure to comply with this order. Failure
4 to file an amended complaint or otherwise respond will result in **DISMISSAL** without
5 further order of the Court.

6 Dated this 19th day of July, 2016.

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BENJAMIN H. SETTLE
United States District Judge